No. 91-622

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1991

STEVEN B. FOX,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Should petitioner's failure to raise denial of a fundamental right on direct appeal defeat a petition for writ of error coram nobis when the initial failure to raise the issue constituted ineffective assistance of counsel?

2. Did the lower courts properly consider the grounds raised by petitioner?

LIST OF PARTIES

The caption of the case in this Court contains the names of all parties to the proceeding in the court whose judgment is sought to be reviewed.

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No.

In The

Supreme Court of the United States

October Term, 1991

STEVE B. FOX,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The petitioner Steven B. Fox respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above-entitled proceeding on June 11, 1991.

OPINIONS BELOW

The order of the United States Court of Appeals for the Third Circuit (Greenberg, Circuit Judge) of July 10, 1991 denying

petitioner's petition for rehearing is reprinted in the Appendix at 1a, *infra*. The judgment and memorandum opinion of the United States Court of Appeals for the Third Circuit (Greenberg, Circuit Judge) affiming the judgment of the District Court, filed on June 11, 1991, is reprinted in the Appendix at 2a, *infra*. The order of the United States District Court for the Eastern District of Pennsylvania (Katz, District Judge) denying the petition for writ of coram nobis, dated December 27, 1990, is reprinted in the Appendix at 13a, *infra*. The order of the United States District Court for the Eastern District of Pennsylvania (Ludwig, District Judge) granting the government's motion to disqualify counsel, dated November 17, 1986 is reprinted in the Appendix at 15a, *infra*.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was entered on June 11, 1991 and a timely petition for rehearing thereon was denied on July 10, 1991. This Court's jurisdiction is invoked pursuant to Title 28, U.S. Code § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due

process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Amendment VI:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the Witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

28 U.S.C. § 1651(a):

§ 1651 WRITS:

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in and of their respective jurisdictions and agreeable to the usages and principles of law.

28 U.S.C. § 1951(a):

§ 1951. Interference with commerce by threats or violence.

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or

commits or threatens physical violence to any person or property in furtherance of a plan or purpose to anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

STATEMENT OF THE CASE

A. Procedural History

Petitioner Steven B. Fox was indicted on October 14, 1986 for conspiracy and attempted extortion in violation of the Hobbs Act, 18 U.S.C. § 1951(a). On March 11, 1987, following a bench trial he was convicted by the Honorable Edmund V. Ludwig. Fox was immediately sentenced to pay a fine of $5,000 and non-reporting probation pending payment of the fine. The fine was paid shortly thereafter. An appeal was filed in the United States Court of Appeals for the Third Circuit under Docket No. 87-1156. The conviction was affirmed.

On September 7, 1990, a petition for writ of error coram nobis was filed in the District Court and on December 5, 1990 an amended petition for writ of error coram nobis was filed. The matter was assigned to the Honorable Marvin Katz, who denied relief on December 27, 1990. An appeal was filed in the United States Court of Appeals for the Third Circuit which affirmed the District Court by a memorandum opinion filed on June 11, 1991. A petition for rehearing was denied on July 11, 1991 and this petition for writ of certiorari has followed.

B. Basis for Federal Jurisdiction

The jurisdiction of the District Court was based upon 18 U.S.C. § 3231.

C. Facts

Steven B. Fox is a movie theater owner who was charged with Hobbs Act extortion, arising from an alleged attempt to put a rival theater owner out of business by having skunk oil spread in his rival's theater. The act was never carried out. Fox admitted the attempt, but claimed it was nothing more than an effort to get even with Wax, a former friend with whom a feud had developed.

The indictment was handed down almost two years after the alleged attempt. In the interim there were no additional attempts against Wax, although the mutual bad feelings continued. Fox engaged Attorney Stanford Shmukler to represent him. Because Shmukler had previously been consulted by Matthew Wax in an unrelated matter, the government moved to disqualify Mr. Shmukler. Shmukler answered, filing an affidavit which noted that there was not even the possibility of a conflict. The trial judge ordered that Shmukler withdraw "to avoid any appearance of impropriety."

Fox engaged other trial counsel. After his conviction, he engaged yet another attorney for the appeal and requested that the denial of his right to be represented by counsel of his choice be raised in the appeal. Appellate counsel ignored the request. The appeal was lost, and present counsel was retained, who filed a petition for writ of error coram nobis and then an amended petition, raising the issues of denial of counsel of choice and ineffective assistance of counsel by reason of appellate counsel's failure to raise on appeal the issue of denial of counsel.

REASONS FOR GRANTING THE WRIT

I.

PETITIONER'S RIGHT TO COUNSEL OF CHOICE IS A FUNDAMENTAL RIGHT WHICH SHOULD NOT BE DEPRECATED BECAUSE OF THE STAGE OF PROCEEDINGS AT WHICH IT IS RAISED, ESPECIALLY WHEN THE FAILURE TO PROPERLY PRESERVE THAT ISSUE WAS A DENIAL OF EFFECTIVE ASSISTANCE OF COUNSEL.

The Court of Appeals held that the standard by which denial of counsel is judged varies according to the stage of the proceeding at which the issue is raised. Noting that Fox failed to raise the issue of improper disqualification of trial counsel on direct appeal, the Third Circuit held that, as the consequences of Fox's conviction were only collateral, the issue of disqualification was not a matter of fundamental character, sufficient to justify coram nobis relief (12a).

By placing the onus on Fox for failing to raise the issue of disqualification upon direct appeal, the Court of Appeals ignores Fox's other issue, that his appellate counsel was ineffective for failing to raise the disqualification issue upon appeal.

This Honorable Court has held that the denial of counsel of choice is per se reversable. In *Flanagan v. United States*, 465 U.S. 259, 104 S. Ct. 1051 (1984), it was held that:

> Obtaining reversal for violation of such a right does not require prejudice to the defense, since the right reflects constitutional protection of the defendant's free choice independent of concern for the objective fairness of the proceeding.

465 U.S. at 268, 104 S. Ct. at 1051.

Despite this clear and concise holding, the Third Circuit has required Fox to show actual prejudice and holds that the failure to do so defeats his claim. The Third Circuit required Fox to show that the result of his trial was unreliable before relief could be granted. This is not the law as held in *Flanagan, supra.* Counsel was clearly ineffective for failing to raise the question of counsel's disqualification on appeal. Based on the holdings of *United States v. Rankin,* 779 F.2d 956 (3rd Cir. 1986) and *United States v. Laura,* 607 F.2d 52 (3rd Cir. 1979) the right to counsel of choice as a matter of right was (and is) a viable issue which based on the Third Circuit law would have resulted in reversal. The failure to include it in the appeal amounted to ineffective assistance of counsel pursuant to the standards established by *Strickland v. Washington,* 466 U.S. 668, 687-96, 104 S. Ct. 2052, 2064-69 (1984).

To establish ineffective assistance of counsel, *Strickland* requires (1) that counsel's representation fall below an objective standard of reasonableness; and (2) that there is a reasonable probability that but for counsel's error, the result would have been different.

There was no justification for the failure of appellate counsel to omit this issue on appeal. As discussed by the Third Circuit in the opinion denying relief herein, had it been raised, it would probably have resulted in remand. The two prongs of *Strickland* are satisfied.

Fox was denied his rights guaranteed by the Sixth Amendment. Not only was he improperly denied counsel of his choice, he was denied effective assistance of counsel.

The Third Circuit has improperly narrowed the area of relief available by coram nobis and has held that certain fundamental

rights are not really that, but depend on the stage of the proceedings. It is submitted that such holding is an unconstitutional denial of Fox's right to counsel and is a proper basis for this Court to accept jurisdiction.

By applying the doctrine of harmless error to the right to counsel of choice, the Third Circuit has eviscerated the holdings of *Flanagan v. United States, supra,* and *Chapman v. California, supra,* and has ignored established precedent.

It is submitted that a fundamental right should not be dealt with in such a cavalier manner. The Third Circuit has ignored the holding of *Chapman v. California,* 386 U.S. 18, 23 (n.8), 87 S. Ct. 824, 828 (1967) which states that the right to counsel is one of the fundamental constitutional rights, so basic to a fair trial that its infraction can never be treated as harmless error.

II.

THE GROUNDS FOR CORAM NOBIS WERE CLEARLY ESTABLISHED.

In order to qualify for a writ of coram nobis the petitioner must show that there are exceptional circumstances which require relief to achieve justice and to correct errors of the most fundamental character. *United States v. Morgan,* 364 U.S. 502, 511, 74 S. Ct. 247, 253 (1954).

It is an extraordinary relief, granted in situations where there is no other means available to the aggrieved party, who must be suffering continuing penalties collateral to his conviction. *United States v. Osser,* 864 F.2d 1056, 1059 (3rd Cir. 1988).

The summary denial of the petition by the District Court was based on the facts of the case, without due consideration

of the particular issues raised. Likewise, in its opinion, the Court of Appeals gave short shrift to the issues, discussing the facts extensively and ignoring the impact of ineffective counsel on appeal. The Circuit Court also did not consider the District Court's failure to allow Fox counsel of his choice by granting the government's motion to disqualify defense counsel without hearing, despite the factual dispute raised by the pleadings and affidavits.

The questions raised in the disqualification motion have been heretofore ignored. The denial of Fox's chosen counsel was to "avoid the appearance of impropriety" [District Court order granting motion to disqualify (15a)]. The failure by the lower courts to consider the legal issues raised was error, resulting in a denial of due process of law as guaranteed by the Fifth Amendment to the Constitution.

There must be a realistic basis for a decision which affects such a fundamental right as the ability to choose one's own counsel. *United States v. Laura*, 607 F.2d 52, 57 (3rd Cir. 1979) holds that once a particular attorney is chosen he may not be arbitrarily disqualified. Likewise, in *United States v. Washington*, 782 F.2d 807, 812-813 (9th Cir. 1974), it was held that there must be an evidentiary hearing to resolve the question as to whether or not counsel should be excluded for a conflict. The importance of a defendant's Sixth Amendment rights is such that the Ninth Circuit refused to allow such rights to be sacrificed without a hearing, on an unsubstantiated premise. The Third Circuit has recognized that, had the failure to grant a hearing on the motion to disqualify been raised on direct appeal:

> . . . it is possible that we might have remanded for a hearing to determine in more detail the nature of the Shmukler-Wax conversations.

(11a).

However, the Third Circuit ignored the ineffective representation of appellate counsel who failed to raise disqualification on direct appeal, holding that Fox waived the issue because his attorney did not raise it.

By failing to look beyond the facts of the case and refusing to address or to directly consider Fox's petition for coram nobis, the District Court and Third Circuit have denied petitioner his rights as guaranteed by the Fifth and Sixth Amendments to the Constitution.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

STEPHEN ROBERT LaCHEEN
Attorney for Petitioner

APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT SUR PETITION FOR REHEARING FILED JULY 10, 1991

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 91-1050

UNITED STATES OF AMERICA

V.

STEVEN B. FOX

Appellant

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Crim. No. 86-431-01)

SUR PETITION FOR REHEARING

BEFORE: SLOVITER, *Chief Judge*, and BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO, and HIGGINBOTHAM, *Circuit Judges*

The petition for rehearing filed by appellant in the above captioned matter having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

Appendix A

BY THE COURT:

s/ Morton I. Greenberg
Circuit Judge

DATED: July 10, 1991

APPENDIX B — JUDGMENT AND MEMORANDUM OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT FILED JUNE 11, 1991

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 91-1050

UNITED STATES OF AMERICA

v.

STEVEN B. FOX

Appellant

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Crim. No. 86-431-01)

BEFORE: SLOVITER, *Chief Judge*, and GREENBERG and HIGGINBOTHAM, *Circuit Judges*

JUDGMENT

This cause came on to be considered on the record from the United States District Court for the Eastern District of Pennsylvania and was submitted under Third Circuit Rule 12(6) on June 6, 1991.

On consideration whereof, it is now here ordered and adjudged by this court that the order of the District Court entered on December 27, 1990, be and same is hereby affirmed.

Appendix B

Costs taxed against appellant.

ATTEST:

s/ Sally Mrvos
Clerk

June 11, 1991

Certified as a true copy and issued in lieu of a formal mandate on July 18, 1991.

Test: s/ Sally Mrvos

Appendix B

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 91-1050

UNITED STATES OF AMERICA

v.

STEVEN B. FOX

Appellant

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Crim. No. 86-431-01)
District Judge: Honorable Marvin Katz

Submitted under Third Circuit Rule 12(6)
June 6, 1991

BEFORE: SLOVITER, *Chief Judge*, and GREENBERG and HIGGINBOTHAM, *Circuit Judges*

(Filed: June 11, 1991)

MEMORANDUM OPINION

GREENBERG, *Circuit Judge*.

Appendix B

Steven B. Fox appeals from an order of December 27, 1990, denying his amended petition for a writ of coram nobis. Exercising plenary review we will affirm.

The basic facts are not in dispute. In 1983 Fox and David Wax were both in the movie business in the Philadelphia area, Wax owning the Narbeth Theater. Fox at that time suggested that they cooperate with respect to the films they were exhibiting but Wax rejected the idea. Fox was obviously upset at Wax's recalcitrance as he thereafter made threats against members of the Wax family. Eventually Fox asked his friend Leland Beloff to help him injure Wax. Beloff in turn engaged Nicholas Marrandino to carry out the scheme which was to damage the Narbeth Theater, principally by scattering skunk oil in it. Marrandino, however, was working with the FBI to which he reported the approach from Beloff. The FBI equipped Marrandino with a body tape recorder following which Marrandino met with Fox. There is no question but that in the ensuing conversation Fox explained how he wanted to have the theater damaged to put Wax out of business. But Fox did more than talk as he took Marrandino to the theater and gave him two bottles of skunk oil as well as rubber gloves and a screw driver to carry out the plan. Furthermore, Fox paid Marrandino $100 for his trouble and, in addition he paid the fee for Marrandino's admission fee to the theater.

Marrandino went into the theater but did not scatter the skunk oil. Nevertheless after he left the theater he went to Beloff's residence and claimed to have carried out the skunk oil scheme. Beloff in turn reported the matter to Fox who discussed the incident with him.

As a result of these events Fox was indicted for an attempted

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Hobbs Act extortion and a Hobbs Act conspiracy. 18 U.S.C. § 1951(a). He originally retained Stanford Shmukler as his attorney but the government moved to disqualify Shmukler. In its motion the government pointed out that David's son Matthew, who was in the theatre business with David Wax, would be "the government's primary witness with respect to the fact, nature and circumstances of the threats" involved. The motion further pointed out that:

> 6. Matthew Wax has advised the government that in approximately September of 1984, he retained Stanford Shmukler to represent him in connection with then contemplated (and now pending) state criminal charges arising out of an insurance claim filed by Wax. According to Wax, he met with Shmukler for several hours and communicated to Shmukler confidential matters, in an attorney/client context, which he would not discuss with anyone other than an attorney. Wax is unwilling to waive his attorney client privilege with respect to his communications with Shmukler, and does not believe that he should be subjected to cross-examination by one to show he has imparted this privileged information.
>
> 7. According to Wax, his communications with Shmukler included matters involving the contemplated state criminal charges, other business affairs and matters relating in some degree to Fox.
>
> 8. Wax paid Shmukler a $2500 retainer which, by letter dated October 4, 1984, Shmukler thereafter refused to refund when Wax decided to

obtain different counsel.

9. Wax's consultations with Shmukler occurred during the time period in which the indictment charges Fox with threatening Wax.

10. Under circumstances such as these, Shmukler's access to privileged information is conclusively presumed, and the Court should refuse to accept defendant Fox's waiver of his right to effective assistance of counsel.

App. at 12-13.

Shmukler filed an answer with a supporting affidavit to the government's motion for his disqualification. He acknowledged that he had met with Matthew Wax and received a $2500 retainer from him but he said that Wax later obtained other counsel for the state charges. Shmukler indicated that the charges against Matthew Wax involved an insurance claim following a fire at Matthew Wax's office and he acknowledges that he had received personal information from Wax as well as information regarding the investigation following the fire. He said, however, that he had received no information from Wax which would force him to "reveal any confidential communications in violation of the attorney-client privilege or to rely on same, nor would the fact that [he] briefly represented Wax result in any prejudice to Fox."

The district court did not hold an evidentiary hearing but by order of November 17, 1986, granted the government's motion to disqualify Shmukler "so as to avoid any appearance of impropriety." At that time the district court postponed the scheduled trial date of December 1, 1986, to December 15, 1986.

On December 2, 1986, James C. Schwartzman and John E.

Appendix B

Riley entered their appearances on behalf of Fox in the district court. Fox and the government then filed a joint motion to extend the time for pretrial motions and for a continuance of the trial date which the district court granted on December 17, 1986. Thereafter Fox's new attorneys filed motions to dismiss the indictment on the grounds of grand jury misconduct and because the indictment did not properly allege the elements of the offenses but these motions were denied. Fox subsequently waived jury trial but was convicted at the ensuing bench trial. Fox was fined $5,000 and, in addition, was placed on non-reporting probation to be vacated upon the payment of the fine.

Fox appealed to this court, asserting that the evidence did not support the conviction but we affirmed without a reported opinion. Fox did not argue on the appeal that Shmukler had been improperly disqualified, though he does assert in these proceedings that he asked his appellate counsel to raise that issue.

On September 7, 1990, Fox filed his petition for a writ of coram nobis, thus initiating the proceedings directly leading to this appeal. He subsequently filed an amended petition, asserting that he had completed his sentence and that, as relief under 28 U.S.C. §2255 was not available to him, his only possible remedy was by a writ of coram nobis. He asserted that his constitutional rights had been infringed because of "the improper disqualification" of Shmukler and because his appellate counsel refused to raise the issue of the improper disqualification. The government filed an answer to the original petition. On December 27, 1990, the district court denied the petition and amended petition determining:

> The Petitions are untimely under the circumstances. There is no showing of fundamental

> error or manifest injustice. Petitioner has made an insufficient showing to overcome the presumption of regularity and correctness. The matters raised are too insubstantial to justify relief. No compelling circumstances warrant such an extraordinary remedy to achieve justice. The evidence of defendant's guilty [*sic*] (including the recorded conversation with Marrandino) is overwhelming.

App. at 23-24 (footnotes omitted).

This appeal followed.

In *United States v. Osser*, 864 F.2d 1056 (3d Cir. 1988), we pointed out that coram nobis relief is limited to correction of errors of the most fundamental character. *Id.* at 1059. Furthermore, it is clear under *Osser* that the writ is not to be used as a substitute vehicle for raising issues that could have been pressed on direct appeal from the conviction.

This case presents a classic situation demonstrating when coram nobis is not available. When the district court was presented with the government's motion to disqualify Shmukler it was required to balance Fox's right to the counsel of his choice with Matthew Wax's right not to have his confidential communications with Shmukler revealed. *See United States v. Moscony*, 927 F.2d 742, 748-49 (3d Cir. 1991). The court's decision to disqualify Shmukler was surely not whimsical for there was no doubt at all that Shmukler had been retained by Matthew Wax and had confidential communications with him. While Shmukler believed that he would not have to breach the attorney-client privilege in cross-examining Wax, and denied that Wax had described to him

"business affairs and matters relating in some degree to Fox," Shmukler acknowledged that Wax mentioned Fox as he said that Wax told him that he knew of Shmukler in part because Shmukler had represented "his friend Steven B. Fox, in other proceedings." In the circumstances it was certain with the range of reason for the court to disqualify Shmukler, though we acknowledge that if the point had been raised on direct appeal it is possible that we might have remanded for a hearing to determine in more detail the nature of the Shmukler-Wax conversations.

Furthermore, we recognize that an unjustified disqualification of counsel, if raised on direct appeal, may result in a reversal even if actual prejudice is not demonstrated. Here, however, the matter is not before us on direct appeal, so we are concerned with whether the right to a particular counsel must be deemed so fundamental that if denied relief should be granted years after the trial by writ of coram nobis. But nowhere in his amended petition does Fox explain what actual prejudice he suffered from Shmukler's disqualification. He does not allege, for example, that his substituted attorneys had an inadequate time to prepare for trial and, in fact, the record demonstrates that they had more time than Shmukler himself would have had for that purpose. Shmukler entered his appearance on October 27, 1986, which gave him only a little more than a month until the original trial date of December 1, 1986. Fox's new attorneys had much more time as they entered their appearances on December 2, 1986, and the trial did not start until February 23, 1987.

In the absence of an actual showing of prejudice Fox makes the conclusory statement in his brief that he "was, and still is, of the opinion that had Shmukler represented him, the outcome of his trial would have been different." Brief at 5. But as he does not tell us why that is so we conclude that there is no showing

that the result of the trial was unreliable. The denial of the particular attorney was, therefore, at most an error of procedural and not substantive character.

We are encouraged to reach our result by our recent recognition that a substantial argument *could* be made that on a habeas corpus proceeding following a state conviction a harmless error analysis is appropriate when a petitioner is denied the counsel of his choice. While we ultimately rejected that position we did so in the context of a case in which the petitioner had raised the issue on direct appeal to the state appellate courts and still faced the direct consequences of the conviction. *See Fuller v. Dresslin*, 868 F.2d 604, 607-09 (3d Cir.), *cert. denied*, 110 S.Ct 203 (1989). Here Fox did not raise the issue on direct appeal and the only consequences of the conviction he faces are collateral. In these circumstances we do not regard the disqualification of counsel as an error of fundamental character, if error at all, so as to justify coram nobis relief.

The order of December 27, 1990, will be affirmed.

TO THE CLERK:

Please file the foregoing memorandum opinion.

s/ Morton I. Greenberg
Circuit Judge

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA DATED DECEMBER 27, 1990

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CRIMINAL ACTION NO. 86-00431-01

UNITED STATES OF AMERICA

v.

STEVEN B. FOX

ORDER

AND NOW, this 27th day of December, 1990, upon consideration of the Petition and Amended Petition for Writ of Coram Nobis and government's response, the Petition and Amended Petition are DENIED. The Petitions are untimely under the circumstances.[1] There is no showing of fundamental error or manifest injustice. Petitioner has made an insufficient showing to overcome the presumption of regularity and correctness. The matters raised are too insubstantial to justify relief.[2] No compelling

---

1. The conviction was affirmed August, 1987. This Petition was filed more than three years later. Defendant had all the information set forth in the Petition for over three years before he acted.

2. A strategic decision not to raise the disqualification issue on appeal because that issue was "extraneous" and "might even detract from the strength of the main issue on appeal" is not a substantial ground for coram nobis. Defendant's Memo at p.3. The court's exercise of its supervisory discretion provided a weak basis for appeal. See *U.S. v. Provenzano*, 620 F.2d 985, 1005 (3rd Cir. 1980).

circumstances warrant such an extraordinary remedy to achieve justice. The evidence of defendant's guilty (including the recorded conversation with Marrandino) is overwhelming.

BY THE COURT:

s/ Marvin Katz
MARVIN KATZ, J.

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA DATED NOVEMBER 17, 1986

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CRIMINAL NO. 86-431

UNITED STATES OF AMERICA

v.

STEVEN B. FOX

ORDER

AND NOW, this 17th day of November, 1986, upon conference with counsel, the government's motion to disqualify Stanford Shmukler, Esq. as counsel for defendant is granted so as to avoid any appearance of impropriety. The time elapsed from filing of the government's motion to disqualify, November 3, 1986, will be excluded for speedy trial purposes.

Steven B. Fox, defendant, is granted 10 days within which to obtain new counsel.

Trial date of December 1, 1986 is continued to Monday, December 15, 1986, 9:30 a.m.

BY THE COURT

s/ Edmund V. Ludwig
Edmund V. Ludwig, J.